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No. 03-339

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOSÉ FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

As petitioner and the United States have shown, the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), is simply a grant of jurisdiction. Although some of respondent's *amici* argue that the ATS provides a cause of action, most of his *amici*—and ultimately respondent himself—recognize that it does not. They argue instead that the ATS provides a federal forum for a species of supposedly "well-recognized" common law tort actions for violations of the law of nations.

The laudable desire to provide redress for injuries suffered at the hands of brutal dictators does not justify distorting the plain language of the ATS or its historical underpinnings. In enacting the First Judiciary Act, Congress sought to vest jurisdiction, not to create causes of action. There was manifestly no such thing in 1789 as a "tort" for a violation of the law of nations. And the law of nations itself was not then, and is not now, the source of any causes of action, but rather a source of rules for deciding otherwise authorized suits.

ARGUMENT

I. The Alien Tort Statute Does Not Provide A Cause Of Action.

Contrary to respondent's claim, construing the ATS, in accordance with its plain terms, as a mere grant of jurisdiction does not improperly focus on a single word in the statute. Resp. Br. at 9. To be sure, the word "jurisdiction" is pivotal in the ATS because it denotes its inherent function. But the phrase "of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States," 28 U.S.C. § 1350, serves the obvious purpose of limiting the scope of the jurisdictional grant. It is no more meaningless than language that limits another jurisdictional grant to suits "commenced by the United States." *Id.* § 1345.

Nor is it true that interpreting the ATS as a simple grant of jurisdiction renders the statute "nugatory from its inception." Resp. Br. at 22. As this Court has recognized, a jurisdictional grant is not meaningless simply because Congress must subsequently create actions that fall within its scope. *United States* v. *Holliday*, 70 U.S. (3 Wall.) 407, 415 (1865) (because the First Judiciary Act was passed before there were any federal criminal statutes, the clause in that Act "giving the Circuit Courts concurrent jurisdiction in all cases of crime cognizable in the District Courts, must, of necessity, have had reference to such statutes as should *thereafter* define offences to be punished") (emphasis added). Indeed, the treaty-prong of the ATS necessarily anticipates the creation of subsequent rights that will fall within the scope of the ATS's jurisdictional grant. And respondent and his *amici* concede that other clauses of Section 9 of the First Judiciary Act "contemplated that Congress might enact legislation under which a criminal prosecution or civil suit might be brought." Resp. Br. at 12 n.15 (emphasis deleted); Br. of Fed. Jur. Prof. at 16 (same). These "prospective" jurisdictional grants, like the ATS, were not "nugatory" upon their enactment.

According the ATS its purely jurisdictional meaning, moreover, does not effectively "rewrite[]" it as though it grants jurisdiction over actions "'arising under statutes defining'" torts elsewhere. Resp. Br. at 13 (emphasis deleted). Like the clauses surrounding it, the ATS illustrates that the "arising under" formulation is not the only way to confer federal jurisdiction over subsequently enacted actions. Nor does the word "violation" distinguish the ATS from other clauses in Section 9 or show that it creates a cause of action. *Id.* at 13, 33. The first and third clauses of Section 9 refer to "crimes . . . committed" and "penalties and forfeitures incurred," yet these clauses did not create underlying actions. See also *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 576-77 (1979) (statute granting "jurisdiction of *violations* of"

federal securities law did not create private right of action) (emphasis added).

The ATS' plain jurisdictional meaning is confirmed by the history of the First Judiciary Act. In creating a new federal judicial system, Congress wrestled with fundamental and hotly contested questions concerning the very existence and role of federal courts, not the creation of specific "causes." See Ptr. Br. at 16-20. Respondent suggests that the ATS was "broadly accepted by Federalists and Anti-Federalists alike," Resp. Br. at 20 n.21, but the anti-federalists tried to block the creation of *any* district courts, and then to limit their jurisdiction to maritime cases, Ptr. Br. at 17-19—efforts that would have eliminated the ATS. The clear import of these battles is that the ATS, like the First Judiciary Act itself, narrowly conferred jurisdiction, and left it to other enactments to create the "causes" to which that jurisdiction extended.

Indeed, the debates over the First Judiciary Act reveal that members of the first Congress appreciated the difference between jurisdiction and "causes of action," and recognized that they were addressing only the former. *Id.* at 18-24.[1] Nor do respondent and his *amici* dispute that the first Congress created numerous causes of action elsewhere, and used markedly different language than that found in the ATS to do so. *Id.* at 14 & n.4, 23. In fact, respondent ultimately concedes that the ATS does not create any cause of action. Abandoning the rationale of the lower courts—whose unanimous recognition of a cause of action he repeatedly touts, Resp. Br. at 4, 8—respondent claims there was "no reason for the First Congress to create a federal statutory right of action for torts in violation of the law of nations." *Id.* at 10 n.11 (internal quotation marks and citation omitted); see also Br. of Fed. Jur. Prof. at 11 (ATS "did not create a statutory

[1] Any claim that the first Congress was unfamiliar with the *concept* of a cause of action, Br. of Nat'l and For. Prof. at 7, is thus flatly wrong. *See also* 3 William Blackstone, *Commentaries* *273 (referring to a "cause of action" in his discussion of private wrongs).

cause of action"). Instead, he argues that such "torts" were already actionable at common law, and under the law of nations itself. Resp. Br. at 11, 13. These claims are incorrect.

II. There Were No Common Law "Torts" For Violations Of The Law Of Nations In 1789.

The historical evidence demonstrates conclusively that there were no recognized common law actions to seek redress for torts "in violation of the law of nations" as of 1789. It is undisputed that tort law was in its infancy at the time, Ptr. Br. at 24, and that Blackstone listed only "trespasses, nuisances, assaults, defamatory words, and the like," as recognized tort actions. 3 Blackstone, *supra*, at *117. Nowhere in his enormously influential treatise did Blackstone refer to piracy, violations of safe-conducts, or infringements of the privileges of ambassadors as "torts." See also William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Laws of Nations*, 18 Conn. L. Rev. 467, 491 (1986) (Blackstone did not treat violations of the law of nations as "a civil tort").

Instead, Blackstone treated these transgressions as crimes. He discussed them in an entirely separate volume devoted to "Public Wrongs," and referred to the State's obligation "to animadvert upon them with a becoming severity," 4 Blackstone, *supra*, at *68—an archaic reference to the imposition of *punishment*. See *Webster's Third New International Dictionary* 85 (1993) (defining "animadversion"). Following his lead, the Continental Congress called, in its 1781 Resolution, for the "expeditious, exemplary and adequate *punishment*" of a largely identical set of violations, noting that the "*punishment* should be co-extensive with *such crimes*." 21 Journals of the Continental Congress 1774-1789, at 1136-37 (G. Hunt ed., 1912 (1781) ("Journals") (emphases added). In the two celebrated incidents in which the rights of diplomats were infringed, the law of nations was vindicated through criminal, not civil, actions. Ptr. Br. at 26. And Congress "animadverted upon" these transgressions by

including them in the first federal criminal statute. See An Act for the Punishment of certain Crimes against the United States, ch. 9, §§ 8-9, 25-28, 1 Stat. 112, 113-14, 117-18 (1790) ("First Crimes Act").

Respondent and his *amici* try to gloss over these facts by noting that "criminal and civil liability could arise out of the same act," and by asserting that the assaulted French General Consul, Marbois, "could also have brought a common law tort action against his assailant in state court." Resp. Br. at 11, 19; Br. of Fed. Jur. Prof. at 14. But the conclusion they seek to draw—that violations of the law of nations were actionable torts—does not follow. Marbois had the same right to bring a tort action for *assault* that any non-diplomat victim of an assault had. The availability of this remedy does not show that infringements of the rights of ambassadors *vel non*—including, for example, the service of otherwise valid legal process on their servants or property, 4 Blackstone, *supra*, at *70—were independently actionable torts. In fact, there could have been no tort action for piracy, because "the common law did not allow civil recovery for an act that constituted both a tort and a felony," *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 382 (1970), and piracy was a felony. 4 Blackstone, *supra*, at *71.

Respondent scoffs at the idea that the first Congress "used the word 'tort' in some innovative" way, Resp. Br. at 12, but neither he nor his *amici* can explain why, if violations of the law of nations were well-established torts, the Continental Congress asked States "to authorise suits to be instituted for damages by the party injured" by such violations. 21 Journals at 1137. Their claim that Congress passed a resolution calling on States to enact statutes "to authorise" damages actions simply to "restate the law of nations," Br. of Fed. Jur. Prof. at 15 n.10, is absurd, and inconsistent with articles written by these same *amici*.[2] It is also belied by evidence that

[2] One scholar explained that "Congress became concerned with *how* to redress individual violations of the law of nations." William S. Dodge,

contemporaries "lament[ed] the states' failure to act upon the resolution," and that Thomas Jefferson "urg[ed] Madison to introduce a bill" in Virginia in 1784 that would have authorized such actions. Casto, *supra*, at 491 n.134.

Amici admit, moreover, that the indemnity actions for the United States that the resolution requested went "beyond the existing common law." Br. of Fed. Jur. Prof. at 16 n.10. Thus, they implausibly claim that Congress used the phrase "to authorise suits" as a way of asking States simultaneously to create entirely new private damages actions and to restate the common law. In fact, the request for an indemnification remedy confirms that injured parties did *not* have tort remedies for damages against offenders—reparations were paid by nations, not by tortfeasors.[3] The 1781 Resolution is simply fatal to any claim that violations of the law of nations were actionable torts.

That other legislative acts were necessary to create the "tort" actions to which the ATS extended jurisdiction is also confirmed by the treaty-prong of the statute. Blackstone identified no "tortious" violations of treaties, and respondent and his *amici* do not even suggest that such torts existed.

The Historical Origins of the Alien Tort Statute: A Response to the "Originalists," 19 Hastings Int'l & Comp. L. Rev. 221, 226 (1996) (emphasis added). This concern demonstrates that redress was not available, not that its availability needed to be restated.

[3] That there were no recognized "law of nations" torts is also confirmed by reactions to the ATS itself. Edmund Pendleton, who helped revise Virginia's statutes and served as Chief Justice of its Supreme Court, asked James Madison "what is meant by a *Tort*? Is it intended to include suits for the Recovery of debts, or on breach of Contracts, *as a reference to the laws of Nations & Fœderal treaties seems to indicate;* or does it only embrace Personal wrongs, according to its usual legal meaning, or violations of Personal or Official privilege of foreigners?" Letter of E. Pendleton to J. Madison (July 3, 1789), *reprinted in* 4 *The Documentary History of the Supreme Court of the United States 1789-1800*, at 444, 446 (M. Marcus, ed., 1992) (second emphasis added). Pendleton associated the law of nations with commercial disputes, not torts, and was plainly mystified by the very idea of a "tort in violation of the law of nations."

Accordingly, this prong of the ATS must be understood to confer jurisdiction over actions created in treaties themselves, not the common law. And several treaties did create damages remedies for injuries inflicted by privateers. See Ptr. Br. at 15 (citing treaties).

III. The Law Of Nations Did Not Create Causes Of Action.

Nor is it true that the law of nations "defined actionable rights even without legislative implementation." Resp. Br. at 13. In making this misleading claim, respondent and his *amici* attempt to blur the distinction between a cause of action—*i.e.*, the authorization to "invoke the power of the court" to enforce a right, *Davis* v. *Passman*, 442 U.S. 228, 239 n.18 (1979)—and the rules of decision used to resolve otherwise authorized actions. Their evidence shows only that the law of nations was the source of the latter. Indeed, international law still does not create private causes of action.

Petitioner does not dispute that eighteenth century lawyers considered the law of nations part of the common law. But U.S. courts resorted to the law of nations "to provide *the rules of decisions* in particular cases." William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv. L. Rev. 1513, 1517 (1984) (emphasis added).[4] Thus, while this Court has recognized that international law "must be ascertained and administered by the courts . . . as often as questions of right depending upon it *are duly presented* for their determination," *The Paquete Habana*, 175 U.S. 677, 700 (1900) (emphasis added), respondent and his *amici* cite no

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[4] *See also* St. George Tucker, *Appendix to* 1 William Blackstone, *Commentaries*, at note E (S. Tucker ed. and comm. 1803) (the law of nations is "resorted to as the rule of decision" where appropriate).

evidence that the law of nations provided the authorization to "duly present[]" "questions of right" in the first place.[5]

In fact, "the law of nations *never* has been perceived to create . . . the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws." *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring) (emphasis added). "International law itself . . . does not require any particular reaction to violations of law." Louis Henkin, *Foreign Affairs and the Constitution* 224 (1972). This principle is reflected in various international documents and treaties that exhort nations to authorize such actions (rather than purport to create the actions for them),[6] and in foreign laws that create civil remedies for violations of international legal norms pursuant to the sovereign powers of the enacting States.[7]

Finally, the short-lived theory of federal "common law" *crimes*, Resp. Br. at 21; Br. of Fed. Jur. Prof. at 7, 12, 17, does not establish that the law of nations gave rise to *civil* causes of action. As one of respondent's *amici* has elsewhere explained, this theory was the product of a bitter partisan conflict, was vehemently criticized at the time, and was

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[5] *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796), and *The Nereide*, 13 U.S. (9 Cranch) 388 (1815), do not show that the law of nations created "enforceable rights." Resp. Br. at 17. International law provided only the rules of decision in these cases; the *causes of action* (for recovery of a debt in *Ware* and libel in *The Nereide*) were provided by domestic law. Indeed, respondent and his *amici* nowhere dispute petitioner's showing that, by the eighteenth century, maritime law was domestic law in both the United States and England. *See* Ptr. Br. at 29 n.9. Thus domestic law, not the law of nations, is the source of maritime causes of action (including the causes of action in *The Nereide* and *The Paquete Habana*).

[6] *See* Br. for the Ctr. for Justice & Accountability at 3 n.2 (citing non-binding Universal Declaration of Human Rights and non-self-executing International Covenant on Civil and Political Rights ("ICCPR")). *See also* Ptr. Br. at 41 (discussing these same documents).

[7] *See* Br. of Int'l Jurists at 24-25 (citing statutes).

renounced by a number of its early proponents, including Jefferson and Attorney General Edmund Randolph. See generally Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. Pa. L. Rev. 1003 (1985). More importantly, this Court flatly rejected the theory, explaining that Congress must "make an act a crime, afix a punishment to it, and declare the Court that shall have jurisdiction of the offence." *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812).[8] So too here, Congress had to create "torts" in violation of the laws of nations, not just confer jurisdiction over such actions.

IV. The Political Departments Did Not Consider Violations Of The Law Of Nations To Be Torts.

Faced with overwhelming evidence that violations of the law of nations were not independently actionable torts as of 1789, respondent tries to show that the courts, Congress and the executive branch thought otherwise. Respondent and his *amici*, however, misapprehend the import of all of this evidence, none of which establishes that violations of the law of nations were cognizable common law torts.

The decision in *Moxon* v. *The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895), for example, flatly refutes respondent's claims. In dismissing a libel action brought by English owners of a ship seized by French privateers in neutral U.S. waters, the court explained that the libellants' suit for restitution was not one for a "tort only," and thus fell outside the jurisdictional grant of the ATS. *Id.* at 947-48. In addressing their admiralty claims, however, the court made

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[8] Respondent's reliance on *Respublica* v. *De Longchamps*, 1 U.S. (1 Dall.) 111 (1784), is thus utterly misplaced. Whatever ability Pennsylvania courts had to create common-law crimes, "[f]ederal courts, unlike state courts, are not general common-law courts." *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 312 (1981). *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153 (1820), is equally irrelevant: the federal statute at issue there formally incorporated a definition of "piracy" from the law of nations.

clear that the libellants had *no cause of action* at all for a violation of the law of nations.

The purported claim for "marine trespass" necessarily depended on the legality of the capture ("it is impossible to enquire into the question of trespass, without involving that of prize," *id.* at 947), and the libellants argued that the capture was illegal because "the law of nations forbid fitting out privateers in a neutral country, or capturing within its limits, friends of the neutral." *Id.* at 943 (recounting counsel's arguments). The court agreed that the conduct violated the law of nations, but concluded that a private party injured by such a violation had no judicial remedy. Such a party could "call[] on the neutral sovereign to assert these rights" through diplomatic means and, if necessary, by force, but "[i]t does not seem proper that a suit, founded on the ground of invasion of neutral territory, should be maintained by a belligerent party." *Id.* at 946.[9]

Moxon also demonstrates the error in the dicta in *Bolchos* v. *Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607). Because Bolchos sought "restitution," *id.*, his suit was not for a "tort" and the ATS thus did not provide jurisdiction over it. Instead, he brought a traditional prize action and relied on a treaty that stated that neutral property found on enemy vessels "may be confiscated." Treaty of Amity and Commerce, Feb. 6, 1778, U.S.-Fr. art. XIV, 1 Malloy 468, 473. There was no claim that, by seizing and selling the property that Bolchos had confiscated, Darrel *violated* a treaty that merely *permitted* confiscations, and the court noted that Darrel's action was consistent with the law of nations. *See* 3 F. Cas. at 811. Thus, because *Bolchos* did not involve any violation of the law of nations or a treaty, it does not establish that such

[9] The court repeated this point, stating that, while the libellants had alleged a violation of the law of nations, "still the question recurs—which is the proper department of the neutral state to inquire into and vindicate this offence?" *Moxon*, 17 F. Cas. at 947. The court concluded it was the business of the executive, not the judicial, department. *Id.* at 947-48.

violations were actionable torts. Instead, as respondent himself concedes, the law of nations and the treaty simply "provided a rule of decision." Resp. Br. at 16.

The fact that the ATS gave state courts concurrent jurisdiction, Br. of Fed. Jur. Prof. at 15, does not demonstrate that torts in violations of the law of nations were cognizable at common law. State courts were given concurrent jurisdiction over actions under 42 U.S.C. § 1983 and the Federal Employer Liability Act, yet these federally created claims plainly were not cognizable at common law. The argument that the concurrent jurisdiction of the circuit courts has no meaning unless such torts were actionable at common law, Br. of Fed. Jur. Prof. at 14, fails for the same reason. The interpretive rule that courts must, where possible, give meaning to all clauses of a statute simply cannot change the historical fact that there were no cognizable common law torts in the 1780s for violations of the law of nations.[10]

Finally, respondent and his *amici* place great weight on a 1795 opinion by Attorney General Bradford. Writing during the neutrality crisis, Bradford described the participation of U.S. citizens in a raid on a British colony as a "violation of a treaty"—not the law of nations. 1 Op. Att'y Gen. 57, 58 (1795). Believing this conduct to be beyond the reach of U.S. criminal laws, Bradford stated that the British victims had "a remedy by a civil suit" in light of the ATS's jurisdictional grant. *Id.* at 59. Bradford appears to have been referring to a recently negotiated and soon-to-be-ratified treaty with Great

[10] In fact, Congress often created federal causes of action in the 1790s by authorizing the recovery of damages "in any court . . . having jurisdiction of the recovery of debts." *See, e.g.*, ch. 29, § 5, 1 Stat. 131, 133 (1790). Because the circuit courts' authority to hear "all suits of a civil nature at common law," First Judiciary Act, ch. 20, § 11, 1 Stat. 73, 78 (1789), extended to debt actions, they presumably could hear cases created by such statutes. Accordingly, Congress could have used similar language to create a cause of action for torts in violation of the law of nations without nullifying the grant of concurrent jurisdiction to the circuit courts.

Britain, which provided that the citizens of one nation "shall forbear doing any damage to those of the other party," and "shall also be bound in their persons and estates to make satisfaction and reparation for all damages, and the interest thereof, of whatever the nature said damages may be." Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, U.S.-Gr. Brit., art. XIX, 1 Malloy 590, 602. Like a comparable article in the treaty with France, see Ptr. Br. at 15, this provision gave aliens a private damages action for violation of a treaty obligation. Bradford's opinion, therefore, is not evidence that violations of the law of nations were independently actionable torts, but rather that the ATS provided jurisdiction for causes of action found elsewhere.

This reading is reinforced by a comparison of Bradford's opinion with one Attorney General Randolph had issued three years earlier. Addressing the arrest of a domestic in the residence of Mr. Van Berkel, the Dutch ambassador who had previously protested the Marbois incident and a prior invasion of his own residence, see Casto, *supra*, at 491-92 n.138, 494, Randolph concluded that the ambassador could "appeal, upon the arrest, to the [First Crimes Act] alone," and that the officer's entrance into the residence might be punishable under that act or as a common law crime. 1 Op. Att'y Gen. 26, 28 (1792). No provision of the U.S. treaty with the Netherlands provided a damages remedy for such conduct, however, and Randolph (unlike Bradford) did not suggest that any civil remedy was available.[11]

In short, none of the evidence respondent cites establishes that violations of the law of nations were independently actionable torts in the 1780s, and the contrary evidence from Blackstone, the 1781 Resolution, *Moxon*, and numerous

[11] The 1907 Attorney General opinion, *see* Resp. Br. at 15 n.17, is not contemporaneous, and its assertion that the ATS and diversity statute "provide a right of action," 26 Op. Att'y Gen. 250, 252 (1907), "should be dismissed as a sloppy reference to the federal courts' jurisdiction and not to the existence of a statutory cause of action." Casto, *supra*, at 479 n.58.

contemporary statements and actions demonstrates that there were no recognized common law tort actions for redress of such violations. Nor is it hard to understand why, after enacting the ATS, Congress failed to create a corresponding cause of action. Ellsworth and the other framers who had worried about U.S. infractions of the law of nations had done all that the law of nations required, by enacting a federal criminal statute that "animadvert[ed] upon [such offenses] with a becoming severity," 4 Blackstone, *supra*, at *68. The law of nations did not require civil redress for such offenses, and Congress's apparent intention to provide such a remedy (in accordance with the recommendations of the 1781 Resolution) was presumably overtaken by the tumultuous events and more pressing needs of the 1790s.

V. The Alien Tort Statute Does Not Confer Power To Create A Federal Common Law Cause Of Action.

Finally, for many of these same reasons, the ATS does not authorize courts to create a federal common law cause of action for violations of the law of nations. Some of respondent's *amici* claim that the ATS empowers courts to determine when international rights should be actionable in U.S. courts, "just as though the federal courts were courts of general jurisdiction." Br. of Alien Friends at 5.[12] But federal courts are not "general common-law courts," *City of Milwaukee* v. *Illinois*, 451 U.S. at 312, and statutes that merely vest jurisdiction (as the ATS does) confer no "authority to formulate federal common law." *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981). While *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), indicates that courts can fashion federal common law rules in cases implicating foreign relations, it authorized the creation of rules of avoidance and deferral to the political

[12] Respondent does not address whether courts can use federal common law to create a cause of action; he argues only that courts may fill gaps in the tort actions that the ATS supposedly federalized. Resp. Br. at 29-32.

branches, not the creation of causes of action. See Ptr. Br. at 31.

Respondent's *amici* rely on the fact that, in the eighteenth century, federal courts viewed the law of nations as part of the common law. Br. of Alien Friends at 6-13. But courts derived rules of decision from this law, not causes of action. See *supra*. Indeed, just three years after the ATS was passed, the court in *Moxon* rejected the claim that a private tort action could be based on a violation of the law of nations.

In fact, even general jurisdiction state courts did not recognize causes of action for violations of the law of nations, which is why Congress urged States to create such actions by statute, Connecticut did so, and Thomas Jefferson urged Virginia to follow suit. Proponents of the First Judiciary Act would not have conferred a common law-making power on federal courts that state courts had never exercised. Rather, they sought to placate anti-federalist fears of federal court aggrandizement, and refused to give federal courts greater equity powers than state courts enjoyed. Ptr. Br. at 16-19.

VI. Separation-Of-Power Concerns Bar Implication Or Creation Of A Cause Of Action.

As petitioner has shown, a judicially implied or created cause of action under the ATS can interfere with the management of foreign affairs, undermine national security efforts, and usurp the constitutional role of the political branches to decide when international norms should be actionable. Ptr. Br. 34-43. Claims that these separation-of-powers problems are judicially manageable are both wrong and irrelevant: courts should not recognize causes of action that raise such concerns absent clear evidence Congress intended them to do so, and there is no such evidence here.

1. As *amici* diplomats acknowledge, ATS cases can "damage U.S. foreign policy interests, including the promotion and protection of human rights." Diplomats Br. at 17. The majority below conceded that ATS litigation

"inevitably raises issues implicating foreign relations," Pet. App. 18a, and, in recent cases, foreign governments expressed concern and even outrage at the mere existence of suits. See Ptr. Br. at 35. And the risk of ATS liability can chill U.S. investment where the promise of such investment, or the threat of withholding it, can be used to promote U.S. values abroad. The judicial doctrines respondent and his *amici* cite provide inadequate protection against such harms.

The political question doctrine did not stop the majority below from addressing a transborder arrest and detention authorized by senior government officials, an issue fraught with "policy and diplomatic" concerns, Pet. App. 3a. Indeed, courts have often refused to dismiss ATS cases on the basis of this doctrine.[13] The act of state doctrine does not bar suits challenging the conduct of U.S. officials at all, see *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897) (doctrine applies to acts of foreign governments), and "rare[ly] . . . preclude[s] suit under the [ATS]." *Kadic*, 70 F.3d at 250. And *forum non conveniens* principles do not bar judicial review, but shift it to the courts of other countries, see, *e.g.*, *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 254 n.22 (plurality opinion) (1981), which only exacerbates separation-of-powers concerns in a case involving U.S. conduct.

Soliciting the views of the State Department about the foreign policy implications of particular cases, Diplomats Br. at 18, presents its own set of problems. "Often the State Department will wish to refrain from taking an official position, particularly at a moment that . . . might be inopportune diplomatically." *Sabbatino*, 376 U.S. at 436. Moreover, deference to such executive branch views forces courts to adopt views on international legal questions that should be adopted by the executive branch, and can tie the availability of relief to the views of particular administrations. See *First Nat. City Bank* v. *Banco Nacional de Cuba*, 406

[13] *See, e.g.*, *Abebe-Jira* v. *Negewo*, 72 F.3d 844 (11th Cir. 1996); *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995).

U.S. 759, 790-91 (1972) (Brennan, J., dissenting). Indeed, respondent himself objects to judicial deference to executive branch judgments for this latter reason. Resp. Br. at 42-43.

2. Similarly, the process of deciding which international legal norms are actionable in U.S. courts necessarily trenches on the constitutional responsibilities and powers of the political branches. Ptr. Br. at 40-43. Respondent blithely asserts that the ATS cannot be used to "enforce unratified or non-self-executing treaties." Resp. Br. at 26. But that is precisely what happened in this case, where the lower courts derived an actionable norm from such treaties, along with non-binding U.N. declarations. See Ptr. Br. at 41. In fact, respondent quickly backtracks from his disavowal, suggesting that it *is* proper to derive actionable norms from non-self-executing treaties in order to give content to the "law of nations" phrase in the ATS. Resp. Br. at 26 n.24.

Nothing in *The Paquete Habana* or its progeny justifies this judicial usurpation of constitutional authority. In arguing otherwise, respondent and his *amici* once again fail to recognize the fundamental difference between deriving causes of action from international law and deriving rules of decision. Where a court uses international law to resolve an otherwise authorized claim, there is no necessary conflict with political branch perogatives; courts have some limited authority to prescribe federal rules of decision where Congress is silent. But, as the very concept of non-self-executing treaties makes clear, rights created by treaty are not actionable unless the political branches choose to make them so. When courts derive actionable norms from non-self-executing treaties, therefore, they inescapably usurp judgments that the Constitution reserves exclusively to the political branches. And, in doing so, they also interfere with the ability of the political branches to influence and shape the international consensus on which norms should be binding.

3. In addition to being mistaken, respondent's claims that courts can manage the separation-of-powers problems of ATS

litigation misses the larger point. It is generally true that, in resolving *duly authorized* actions, courts cannot shrink from their duty to interpret statutes merely because their decisions may affect foreign relations. *Japan Whaling Ass'n* v. *American Cetacean Soc.*, 478 U.S. 221, 230 (1986). But the issue here is whether the ATS should be interpreted to authorize an action in the first place. Because actions for violations of international legal norms raise grave separation-of-powers concerns, courts should not imply or create them absent clear evidence that Congress intended them to do so. Cf. *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983) (refusing, on separation-of-powers grounds, to imply a remedy for violations of military members' constitutional rights).

There is no such evidence here. To the contrary, as petitioner has shown, and respondent and his *amici* nowhere dispute, the founding generation repeatedly sought to avoid offending other nations. Whether or not they expected the law of nations to evolve, members of the first Congress plainly did not intend courts to recognize causes of action that would permit U.S. courts to pass moral, factual and legal judgment on the conduct of foreigners in their own countries; that would provoke expressions of concern and outrage by foreign governments; and that would complicate political branch management of foreign affairs. See Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. 819, 844, 848 (1989) ("*Law of Nations*") (early pronouncements about the application of the law of nations were intended to augment executive power over foreign affairs).[14]

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[14] The "transitory tort" doctrine, Resp. Br. at 22-24, does not prove otherwise. Respondent offers no evidence that other countries recognized torts for violations of the law of nations in the 1780s. Thus, U.S. recognition of such claims for conduct that occurred between aliens on foreign soil would have given U.S. law extra-territorial application, by providing remedies where foreign nations would not have. It would also have exceeded Article III's grant of alienage jurisdiction.

VII. Congress Has Not Ratified Implication Or Creation Of A Cause Of Action.

Respondent and his *amici* quote extensively from floor statements and committee reports accompanying passage of the Torture Victim Protection Act ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992), in an effort to show that Congress ratified judicial recognition of a cause of action under the ATS. As petitioner and the government have shown, however, these statements concerning the meaning of a statute passed centuries earlier are irrelevant. See *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 840 (1988); *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 783 n.12 (2000). In fact, passage of the TVPA undermines respondent's claims, since there would have been no need to create an express cause of action for aliens for torture and extra-judicial killings if, as respondent claim, the ATS provided aliens with a remedy for violations of all binding international legal norms.

Several *amici* argue that the TVPA, as well as several other enactments, should be understood as leaving the judicially implied cause of action under the ATS intact. Br. of Nat'l. & For. Prof. at 15-16; Br. of Alien Friends at 15. The TVPA, however, was not a "comprehensive reexamination and significant amendment of" the ATS that "left intact the statutory provision[] under which" a cause of action had been implied. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 382 (1982). The TVPA is not part of the ATS at all, and the decision to codify it as a note to the ATS was not made by Congress. See Br. of Nat'l Ass'n Mfrs. at 18 n.28.

Nor does the TVPA compel the conclusion that the ATS creates a cause of action. In both *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), and *United States* v. *Estate of Romani*, 523 U.S. 517 (1998), later, more detailed enactments foreclosed broad interpretations of earlier statutes. Here, the clear implication of the TVPA's detailed

express cause of action is that the ATS does not provide such a right.

In fact, the TVPA represents the constitutionally proper means for the federal government to demonstrate this Nation's commitment to fundamental human rights. Such legislation, in which the political branches determine which norms are actionable, provides courts with concrete, judicially manageable liability standards, and ensures that they confront politically sensitive cases with the blessing of the departments responsible for managing foreign affairs. Other nations have likewise demonstrated their own commitment to such rights through legislatively conferred causes of action.[15]

VIII. Petitioner Did Not Violate Any Actionable Norm Of Customary International Law.

1. If this Court concludes that it is proper to imply or create a cause of action under the ATS, it should limit such actions to enforcement of those norms to which the political branches have assented. Respondent objects that any limitation on ATS actions would "redraft the statute." Resp. Br. at 45. From the very outset, however, "the United States endeavored to influence the development of the law of nations by asserting diplomatic positions that at times were in opposition to established international law." Jay, *Law of Nations* at 846. In light of that history, there is absolutely no reason to believe that the drafters of the ATS contemplated that they were creating tort liability for the violation of norms to which the United States itself has not assented.

Indeed, the propriety of such a limitation is illustrated by respondent's defense of the decision below. He cites a non-binding conclusion of a U.N. working group, which found

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[15] *See, e.g.*, art. 1, § 1, VStGB (Germany) (Code of Crimes Against International Law), (specifying crimes); § 403, StPO (Germany) (Criminal Procedure Code) (providing civil action for same); C. Pr. Pén., arts. 689-2, 689-3, 689-8, 689-9 (France) (Criminal Procedure Code) (specifying crimes); *id.* arts. 2-3 (providing civil action for same).

that his detention violated the Universal Declaration of Human Rights, the ICCPR, and a U.N. General Assembly resolution. Resp. Br. at 49. But, the United States approved the Universal Declaration on the understanding that it was not binding; it ratified the ICCPR subject to the reservation that this treaty did not give rise to any actionable rights; and U.N. resolutions are, by definition, non-binding. Ptr. Br. at 41. Nothing in the language of the ATS justifies, let alone compels, the conclusion that the statute imposes tort liability for violation of international norms that the political branches have agreed to on the understanding they are not legally binding.

2. In all events, respondent's brief detention did not violate customary international law, which requires a detention to be "prolonged." Restatement (Third) of Foreign Relations Law § 702(e) (1987). Respondent dismisses the Restatement as an "anomalous departure," Resp. Br. at 48 n.48, but the ICCPR and Universal Declaration do not define "*arbitrary* detention" as any detention, no matter how brief, and a single district court's rejection of the Restatement, *id.* (emphasis added), is not evidence of state practice. Finally, respondent's detention was not "arbitrary," because it was legally authorized, as the United States has shown.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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